Environment Centre NT
protecting nature | living sustainably | creating a climate for change

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Sent via email to: DGR@treasury.gov.au

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Dear Sir/Madam

Submission in relation to Tax Deductible Gift Recipient Reform Opportunities Discussion Paper

Thank you for the opportunity to provide a submission in relation to the Discussion Paper "Tax Deductible Gift Recipient Reform Opportunities Discussion Paper 15 June 2017" (Discussion Paper). We acknowledge the support of the Australian Conservation Foundation in preparing this submission.

The purpose of the Environment Centre NT is to

- protect and restore biodiversity, ecosystems and ecological processes,
- foster sustainable living and development, and
- cut greenhouse gas emissions and build renewable energy capacity.

The Environment Centre NT (ECNT) works by

- advocating for the improvement of environmental policies and performance of governments, landholders, business and industry;
- partnering on projects and campaigns with conservation and climate organisations, governments, Indigenous organisations, community groups, businesses, and landholders;
- raising awareness amongst community, government, business and industry about environmental issues and assisting people to reduce their environmental impact;
- supporting community members to participate in decision making processes and action;
- recognising the rights, aspirations, responsibilities and knowledge of the Territory's Indigenous peoples; and,
- acknowledging that environmental issues have a social dimension.

For over 35 years, ECNT has positively contributed to the development of environmental laws and policies in the NT, provided a voice for the community on environmental issues ,

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educated community members about how they can reduce their environmental impact and put forward innovative and well-informed projects and policies.

We wish to respond to the consultation questions as follows:

1. **What are stakeholders' views on a requirement for a DGR (other than government entity DGR) to be a registered charity in order for it to be eligible for DGR status. What issues could arise?**

ECNT has no objection to the proposal that an organisation must be a registered charity to be eligible for DGR status. It may be that some organisations are DGRs that do not for some reason qualify to be charities. An audit should be done of which organisations are in this situation before any recommendations are made in this regard.

2. **Are there likely to be DGRs (other than government entity DGRs) that could not meet this requirement and, if so, why?**

See response to question 1.

3. **Are there particular privacy concerns associated with this proposal for private ancillary funds and DGRs more broadly?**

ECNT is not a private ancillary fund and has no privacy concerns regarding the requirements of the ACNC to publish information of its public register.

4. **Should the ACNC require additional information from all charities about their advocacy activities?**

In the Discussion Paper both charitable purpose and charitable activities are raised. Charity law focuses on purposes and not activities, and the DGR framework generally has a focus on purpose rather than activity. As such, and in the absence of strong and compelling reasons to the contrary, the focus of DGR reform should likewise focus on purposes. Such strong and compelling reasons do not exist and therefore no shift in focus towards activities such as advocacy is warranted.

The current legal regime is robust in outlining the purposes for which charities can legitimately be established as well as in ensuring charities must demonstrate that they do not have a 'disqualifying purpose.'

We therefore strongly oppose the activity-level focus in the review (as suggested in questions 4-6; 12-13 of the discussion paper) as such an approach:

a) Casts doubt and uncertainty over what activities a DGR entity can lawfully undertake resulting in a chilling effect; and
b) Insufficiently establishes that the current regime of 'charitable purpose' is not robust for regulating the sector.

The Discussion Paper states that "there are concerns that charities are unsure of the extent of advocacy they can undertake without risking their DGR status. This is a particular concern for environmental DGRs, which must have a principal purpose of protecting the environment." The implication is that advocacy is not an appropriate activity for a charity to undertake for the purpose of protecting the environment. This is clearly incorrect and is addressed further in Part A of our submission. Advocacy is a legitimate activity for charitable organisations in furtherance of their charitable objects, and as a purpose in its own right if it furthers another charitable purpose, as established in the High Court case of Aid/Watch Incorporated v Commissioner of Taxation [2010] HCA 42 and referred to in the ACNC Guidance Note "Charities, elections and advocacy" issued in April 2016 (ACNC Guidance Note).

The Discussion Paper states "Scrutiny of an organisation's continued eligibility is appropriate as the scope of activities undertaken by an organisation can change over time, potentially making them ineligible for DGR status." The issue for retention of charity status is not whether the scope of activities undertaken by an organisation can change over time, but whether the organisation's purposes have changed to be outside the charitable purposes set out in the legislation.

The Discussion Paper seeks to treat advocacy as different to other activities undertaken by charities by seeking views regarding a proposal for new reporting obligations for advocacy activities. In regard to this position, we comment as follows:

a) Charities undertaking advocacy has been recognised as both a legitimate activity and one essential to our system of parliamentary democracy.

b) Advocacy is an important approach which charities can use to address the causes of environmental and social problems, rather than just the symptoms – this often requires policy change. For example, if a coal mine is polluting a river because of poor regulation, environmental remediation work to treat affected wildlife downstream will have little impact if the mine can keep polluting the river – this will require advocacy to ensure the mine complies with regulations or adequate regulations are introduced.

c) No evidence has been put forward for the need for new reporting obligations for advocacy activities – they are strongly opposed on the basis that they would impose new and unjustified red tape on charities.

d) The Discussion Paper asserts that "some charities and DGRs undertake advocacy activity that may be out of step with the expectations of the broader community". This assertion is made without any supporting evidence. Unsubstantiated and speculative statements about the expectations of the broader community should not serve as a basis for making public policy.

e) Requiring that a certain proportion of an environmental organisation's activities be directed towards environmental remediation represents an intrusion on the autonomy of environmental organisations and amounts to government trying to 'pick winners' in terms of what approaches charities should use to achieve their charitable purpose. Charities and their supporters are in the best position to determine what approaches are most appropriate to achieve their charitable purpose – therefore any new restrictions and limitations are strongly opposed on the basis that they would impose new and unjustified red tape on environmental charities which will make it harder for them to achieve their charitable purpose.

f) Well targeted and proportional approaches to maintain transparency and accountability for charities are supported and this can be achieved by ensuring all DGRs are registered as charities under the purview of the ACNC, as the Discussion Paper proposes.

g) Existing charity law sets appropriate boundaries for what advocacy activities by charities are acceptable, and the ACNC guidance for charities is helpful and reflective of the law. Accordingly, no further changes are justified or necessary.

5. Is the Annual Information Statement the appropriate vehicle for collecting this information?

- See response to question 4. There is no justification for this information to be collected and it should not be.

6. What is the best way to collect the information without imposing significant additional reporting burden?

- See response to questions 4 and 5.

7. What are stakeholders' views on the proposal to transfer the administration of the four DGR Registers to the ATO? Are there any specific issues that need consideration?

ECNT supports the transfer of the administration of the four DGR Registers but we do not believe that the ATO is the appropriate body to undertake this task. The ACNC was purpose-built for regulating charities and to be a 'one stop shop' for the sector. It is an independent entity that can play the role of administering the DGR Registers without the conflicting objectives that the Tax Office has (being a revenue raising entity) and operates at arms-length from political decision-making. If the administration of the four DGR registers are to be transferred then the most appropriate entity to receive them is the ACNC.

8. What are stakeholders' views on the proposal to remove the public fund requirements for charities and allow organisations to be endorsed in multiple DGR categories? Are regulatory compliance savings likely to arise for charities who are also DGRs?

The operation of a public fund can create an additional reporting, accounting and governance burden on some DGRs. However, the impacts of removing the public fund requirement needs further investigation before a recommendation is made so that potential complexities of doing so can be fully understood.

9. What are stakeholders' views on the introduction of a formal rolling review program and the proposals to require DGRs to make annual certifications? Are there other approaches that could be considered?

No. ECNT welcomes and accepts that the transparency and accountability of DGRs is important. However, we believe reviews and audits should be conducted only at the point where systemic issues have been identified. Giving a regulator powers beyond this opens up a situation similar to what arose in Canada in 2014 under former Prime Minister Stephen Harper who launched politically

motivated special tax audits on environmental groups to silence critique of his government. The Harper government made a special allocation to the Canadian Revenue Agency — during otherwise deep budget cuts — of $13.4 million to fund tax audits of "political activities" by non-profit groups that provide tax receipts for donations. The effect was at worse, a 'chilling' effect to frighten organisations from speaking out. At best, it tied up the resources of organisations in responding to audits and left them in limbo rather than pursuing their important work to protect nature and achieving environmental outcomes. https://www.theglobeandmail.com/news/politics/study-cites-chill-from-tax-agency-audits-of-charities-political-activities/article19551584/]

The ACNC and the ATO already have the power to undertake reviews and audits where they believe they are warranted - new and costly formal review processes are necessary. We therefore strongly recommend a proportionate and risk-based response to this issue. Such a response would include requiring DGRs to be registered with the ACNC (as the Discussion Paper proposes), with the ACNC and the ATO using their existing compliance approach to ensure compliance with the law. This can involve undertaking reviews and audits using their existing powers where systemic issues have been identified.

The activities of charities are by their nature in the public domain and the public are vigilant in scrutinising these activities and raising concerns with the regulator. The ACNC is also vigilant and has appropriate powers to investigate a charity and taken appropriate action. This is evidenced by the ACNC Charity Compliance Report 2015 – 2016 which states:

> *"Over the last two years, we received 1,872 concerns about charities. This was a significant increase over the previous two years when we received 1,307 concerns. The additional concerns resulted in the ACNC opening 149% more investigations, and resulted in 28 compliance revocations."*

10. What are stakeholders' views on who should be reviewed in the first instance? What should be considered when determining this?

See response to question 9.

11. What are stakeholders' views on the idea of having a general sunset rule of five years for specifically listed DGRs? What about existing listings, should they be reviewed at least once every five years to ensure they continue to meet the 'exceptional circumstances' policy requirement for listing?

This is requirement is not necessary if these organisations are charities registered with and reporting to the ACNC. If the 5 year reapplication was dealt with by politicians it may result in significant disruption. The process is often a political one and the consequence is that with the turn of the political cycle specified DGRs may be revoked.

12. Stakeholders' views are sought on requiring environmental organisations to commit no less than 25 per cent of their annual expenditure from their public fund to environmental remediation, and whether a higher limit, such as 50 per cent, should be considered? In particular, what are the potential benefits and the potential regulatory burden? How could the proposal be implemented to minimise the regulatory burden?

Any move to implement such a requirement would be a direct attack on the legitimate and lawful advocacy activities of environmental organisations and fly in the face of the High Court's decision in *Aid/Watch* discussed above. Charities must be permitted to pursue their charitable purpose in the most effective and efficient way possible (while remaining lawful). How they achieve these purposes must not be dictated or limited by the government.

Environmental organisations already have to meet the test in the *Charities Act* to become endorsed as a charity and then comply with the conditions of that endorsement. Additional conditions should not be added to this. This is a clear politicisation of an administrative task and would impose conditions on environmental charities that are not put upon any other charities.

As mentioned in the introduction above, courts are clear that advocacy is integral to achieving charitable purpose and that there is a foundation in the Constitution of the Commonwealth of Australia for advocacy. Any proposed changes having the effect of curtailing the lawful activities of environmental groups moves away from the law as it is currently understood. It follows that DGR status should be bestowed on charities, including charities whose purposes are advancing the

environment, and that no additional conditions should be attached to this that limits advocacy in any way apart from the limitations already set out in the *Charities Act*.[1]
Creating discrepancies between the rules for being listed as a DGR for different charities is unfair and endorses (or 'cherry picks') some charitable purposes as more important than others. It is important to raise here that conducting advocacy activities is common place across the whole of the charitable sector to achieve a variety of charitable outcomes, not just environmental.
If changes were made so that conditions were imposed on environmental organisations to limit advocacy or otherwise dictate their activities, this would be an inconsistent and politically-motivated singling out of environment groups at a time where charities have called for consistent, independent regulation through the ACNC. Further, it creates significant compliance issues for existing environmental organisations as well as contributing to the inefficient allocation of government resources.

As discussed above environmental remediation is one way in which an environmental organisation may achieve its purposes, however, it is not the only way. Requiring that a certain proportion of an environmental organisation's activities be directed towards environmental remediation represents an intrusion on the autonomy of environmental organisations and amounts to government trying to 'pick winners' in terms of what approaches charities should use to achieve their charitable purpose. Charities and their supporters are in the best position to determine what approaches are most appropriate to achieve their charitable purpose – therefore any new restrictions and limitations are strongly opposed on the basis that they would impose new and unjustified red tape on environmental charities which will make it harder for them to achieve their charitable purpose.

This imposition of such an arbitrary requirement would unnecessarily increase red tape on all environmental organisations and effectively remove vital tax concessions from groups legitimately focused solely on advocacy, education, research or legal cases.

To impose a limit on one category of DGR would appear to be singling out environmental organisations as particularly troublesome to government. The requirements would call for a tracing of money, property or benefits either received or given by a DGR to the ultimate activity on which those things are applied. Practically, this is a very difficult if not impossible exercise requiring substantial resources going well beyond what is reasonable, or necessary, to ensure DGRs are accountable to the public and government.

[1] I.e. a purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy or a purpose of promoting or opposing a political party or a candidate for political office - see Charities Act s.11.

The Aid/Watch case which went all the way to the High Court and was the result of the mobilisation of the charitable sector to ensure that the High Court provided clarity on the issue of advocacy and to ensure that the small incorporated association of Aid/Watch was not silenced. If the government were to make any move to reform laws to restrict advocacy as proposed, the government should expect the courts to be called upon again to scrutinise any such restriction.

13. Stakeholders' views are sought on the need for sanctions. Would the proposal to require DGRs to be ACNC registered charities and therefore subject to ACNC's governance standards and supervision ensure that environmental DGRs are operating lawfully?

ECNT condemns any illegal behaviour but stresses that laws already exist to deal with these matters. The recommendations proposed would create unnecessary red tape, overlap existing laws and provide implementation difficulties.

It is already the case that a registered charity with the ACNC has to meet the test in the *Charities Act* to become endorsed as a charity and then comply with the conditions of that endorsement.

The *Charities Act* provides that the following purposes would disqualify an organisation from charitable purpose:

(a) the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy; or
(b) the purpose of promoting or opposing a political party or a candidate for political office.[2]

This is a requirement taken incredibly seriously by ECNT. If environmental DGRs are required to register and be regulated by the ACNC (a recommendation that ECNT supports), then nothing further is needed by way of regulation in this space.

As discussed above, the HoR DGR Inquiry uncovered no evidence of unlawful conduct by environment groups. Evidence did stress that peaceful assembly or protest has long been an important part of Australian democracy and it remains so today. Peaceful protests are a symptom of a healthy democracy. International law binds Australia to respect, protect and facilitate Australians' rights to assemble peacefully and associate freely.[3] This entails a positive obligation on the government to facilitate peaceful assembly and a presumption in favour of unrestricted and unregulated peaceful protests.[4]

[2] *Charities Act 2013* (Cth), s.11.

[3] Human Rights Council, The Rights to Freedom of Peaceful Assembly and of Association, 24th sess, UN Doc A/HRC/RES/24/5 (8 October 2013) [2].

[4] OSCE Office for Democratic Institutions and Human Rights, Guidelines on Freedom of Peaceful Assembly, 2010, 2.2

Further, a recommendation like this would be unhelpful when dealing with concerns about illegal behaviour by individuals within organisations or within the environment movement more widely. If criminal laws are broken by individuals in the course of these activities then those individuals are subject to those laws. We note the words of Mr Jason Wood MP (dissenting government member of the HoR DGR Inquiry Committee):

> *"I do have concerns about this recommendation. Firstly, drafting laws or regulations would be very complex and could only practically work if a DGR at the board or committee level made a decision to use violence or damage to property. In this case I would support sanctions against the DGR, however I also believe this scenario would be very unlikely and serious offences would more likely be made by individuals on a random basis. Also, for offences which are not sanctioned at the board or committee level, or do not involve violence or damage to property, current state laws would suffice."*[5]

Current charity law and criminal laws cover the field with regard to unlawful activities. Any move to impose additional regulation or sanctions for charities will be viewed as a step to discourage peaceful assembly and restrict peaceful protests in Australia.

We thank you for the opportunity to provide a submission in relation to the Discussion Paper.

Yours faithfully

Shar Molloy

Shar Molloy

Director

Environment Centre NT

5 Environment Committee, Report into the Register of Environmental Organisations, p87-88 http://www.aph.gov.au/Parliamentary_Business/Committees/House/Environment/REO/Report (accessed 6 July 2017)